Supreme Court, U.S.
FILED
JUN 27 1996
CLERK

No. 95-1937

In The

Supreme Court of the United States

October Term, 1995

BERNARD SCHWARTZ,

Petitioner,

v.

DOC'S FOOD STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Oklahoma, Division No. 1

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN M. IMEL, OBA No. 4542
MOYERS, MARTIN, SANTEE,
IMEL & TETRICK
320 South Boston Building
Suite 920
Tulsa, Oklahoma 74103
(918) 582-5281

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

TABLE OF CONTENTS

Page

I. REASONS FOR DENYING THE WRIT 1

II. LEGAL ARGUMENTS 1

A. OKLAHOMA STATE STATUTE AUTHORIZING AWARD OF ATTORNEY FEES TO THE PREVAILING PARTY DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION 1

B. THE QUESTION RAISED BY PETITIONER IS SETTLED AND HAS BEEN RESOLVED BY THIS COURT 6

III. CONCLUSION 7

IV. APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Aleyska Pipeline Serv. v. Wilderness Society, 421 U.S. 241 (1975) 2

Bozarth v. Atlantic Richfield Oil Co., 833 P.2d 2 (Alaska 1992) 4

Chicago & N.W.R. Co. v. NYE Schneider Fowler Co., 260 U.S. 35 (1922) 6

Fogerty v. Fantasy, Inc., 510 U.S. ___, 127 L.Ed. 2d 455 (1994) 6

Iowa Life Ins. Co. v. Lewis, 187 U.S. 337 7

Missouri, Kansas & Texas Railway Co. v. Cade, 233 U.S. 642 (1914) 3

Moore v. Local 569, 53 F.3d 1054 (9th Cir. 1995), *cert. den.*, 116 S. Ct. 908 (1996) 5, 6

Sloan v. Atlantic Richfield Co., 552 P.2d 157 (Alaska 1976) 4

Thayer v. Phillips Petroleum Co., 613 P.2d 1041 (Okla. 1980) 2

Van Huff v. Sohio Petroleum Co., 835 P.2d 1181 (Alaska 1992) 4

STATUTE

12 O.S. § 936 (1991) 2, 3, 5, 7

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. REASONS FOR DENYING THE WRIT

Petitioner characterizes the matter appealed herein as a "piddling case" in that it is an action for recovery on a $400.00 check that was instituted by Respondent in the Special Division of the District Court of Tulsa County, State of Oklahoma (the "small claims court"). However, such case is pertinent to Respondent, a grocery store in a small community attempting to recoup a $400.00 check written by Petitioner. This small claims case is a simple holder in due course action, however, Petitioner has asserted numerous collateral issues in the appeal to the central issues asserted at trial in which remains one issue before the United States Supreme Court as to whether an award of attorney fees to prevailing parties are proper.

Controlling authority from the United States Supreme Court and the Oklahoma Supreme Court has held that state statutes authorizing an award of attorney fees to the prevailing party do not violate the United States Constitution. As the issue raised by Petitioner has been previously decided by this Court, no compelling reason exists for this Court to grant certiorari.

II. LEGAL ARGUMENTS

A. OKLAHOMA STATE STATUTE AUTHORIZING OF AWARD OF ATTORNEY FEES TO THE PREVAILING PARTY DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The general rule applied in United States courts with respect to attorneys fees is that the prevailing party is not

entitled to an award for attorneys fees from the losing party absent state statute or contractual arrangements. *Aleyska Pipeline Serv. v. Wilderness Society*, 421 U.S. 241 (1975). Such rule is described as the "American Rule." *Id.* at 247. In the instant case attorney fees are authorized pursuant to Oklahoma state statute which provides as follows:

> In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, . . . the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

12 O.S. § 936 (1991). Therefore, under the American Rule, attorney fees were proper in Respondent's underlying action to recover on a check which constituted a negotiable instrument. Petitioner contends that the statute violates the due process requirements of the Fourteenth Amendment to the United States Constitution.

The Oklahoma Supreme Court has specifically held in an action instituted in small claims court that a statutory right to attorneys fees does not violate the Fourteenth Amendment to the Constitution of the United States. *Thayer v. Phillips Petroleum Co.*, 613 P.2d 1041, 1045 (Okla. 1980). The *Thayer* Court found that "the statute is not only bottomed on a rational basis, but that it serves a compelling public interest, and that the distinction and classification drawn by it withstand the inspection of strict scrutiny" where fundamental rights and liberties are involved. *Id.* at 1045. In fact, the statute in *Thayer* allowed only a prevailing plaintiff an attorney fee award, not the defendant. The Court nevertheless upheld the

statute. *Id.* By contrast, in the instant case, the statute provides attorney fees for whomever is the prevailing party. 12 O.S. § 936.

The *Thayer* decision is in line with the seminal United States Supreme Court case dealing with the constitutionality of prevailing party attorney fees authorized by state statute. In *Missouri, Kansas & Texas Railway Co. v. Cade*, 233 U.S. 642 (1914), the losing party challenged the Texas statute authorizing prevailing party attorney fees in a small claims proceedings. The *Cade* Court held that the statute was not repugnant to the "due process" clause of the Fourteenth Amendment. *Id.* at 651. The Court reasoned that

> Even where the [attorney fee] statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more oppressive where the amount involved is small.

Id. The statute's authorization of attorney fees only imposes "compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand." As in the *Thayer* case, the statute in *Cade* only provided for an award of attorney fees to a prevailing plaintiff not a prevailing defendant, yet the Court upheld the provision. By contrast, in the instant case, the Oklahoma statute involved provides that the prevailing party, either plaintiff or defendant, may recover its attorney fees. Therefore, it is clear that under precedential decisions of the United

States Supreme Court, 12 O.S. Section 936 does not violate the Fourteenth Amendment of the United States Constitution.

The only authority cited by Petitioner to support his proposition is from the dissenting opinions decided by the Alaska Supreme Court. In fact, in most of the cases cited by Petitioner, the majority opinion upholds an attorney fee award authorized by state statute. *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2 (Alaska 1992); *Sloan v. Atlantic Richfield Co.*, 552 P.2d 157 (Alaska 1976); *Van Huff v. Sohio Petroleum Co.*, 835 P.2d 1181 (Alaska 1992).

The *Van Huff* decision held that attorney fee statutes do not violate the state or federal constitutional guarantees of due process of law. *Van Huff*, 835 P.2d at 1185. The *Bozarth* decision held that one who has been forced to litigate in order to vindicate one's rights should rightly be reimbursed for litigation expenses. *Bozarth*, 833 P.2d at 4, n.3. These cases recognized a compelling governmental interest in the protection of parties forced to incur the financial burdens of attorneys fees arising in litigation.

Petitioner's argument of "right of access" is inapplicable to the instant case in that Respondent was the party attempting to vindicate its rights by bringing the action against Petitioner in small claims court. Moreover, either party under the Oklahoma statute challenged may obtain attorney fees if they are deemed the prevailing party. Respondent bore the risk of incurring the expense of pursuing the case to vindicate its rights and was awarded only a portion of its attorney fees. The elimination of the "loser-pays" rule would discourage parties who have

justifiable claims because of the inability to recover the cost of recovery of such claims. There exists abundant controlling authority upholding the constitutionality of the award of attorney fees to prevailing parties. Therefore, the Trial Court did not commit error in awarding Respondent its attorney fees and costs.

Petitioner further asserts that the Court of Appeals of Oklahoma, Division No. 1, failed to address the issues with respect to attorney fees awarded in Small Claims cases. This assertion is false. The Court of Appeals specifically addressed this issue stating that

> [1]Under the Oklahoma Small Claims Procedure Act, 12 O.S. 1991 § 1751 et seq., any statute providing for an award of attorney fees applies in small claims actions so long as an attorney makes an appearance in the case. 12 O.S. § 1764. In that regard, Oklahoma statute permits an award of prevailing party attorney fees in an action to recover on a "negotiable instrument." 12 O.S. 1991 § 936. . . . Because the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its award of attorney fees. See, e.g. *Firemen's Ins. Co. of Newark, N.J. v. Renegar*, 856 P.2d 595 (Okla.App. 1993) (trial court's judgment regarding attorney fees will not be disturbed absent an abuse of discretion).

(See App. I, pp. 3, 4). Petitioner further complains that the Court of Appeals did not properly consider constitutional issues raised in *Moore v. Local 569*, 53 F.3d 1054 (9th Cir. 1995), *cert. den.*, 116 S. Ct. 908 (1996). However, the *Moore*

case is not primary controlling authority in this jurisdiction. Furthermore, the *Moore* facts are considerably distinguishable from the instant case. *Moore* involved a collective bargaining agreement's attorney fee shifting provision in arbitration proceedings. The contract provision at issue in *Moore* provided for attorney fees only for a party who successfully defended an arbitration, not either party who prevailed. *Id.* at 1056. In the instant case, the statute authorizes an award of attorney fees to either plaintiff or defendant as prevailing party in a district court proceeding. The *Moore* Court struck down the fee shifting provision based upon the rights guaranteed members of labor organizations under 28 U.S.C. Section 411(a)(4), not under the United States Constitution. Consequently, the *Moore* case is not on all fours with the present case and should not apply to render prevailing party attorney fee statutes void. Therefore, the decision of the Court of Appeals of Oklahoma should stand.

B. THE QUESTION RAISED BY PETITIONER IS SETTLED AND HAS BEEN RESOLVED BY THIS COURT

The United States Supreme Court has consistently upheld state and federal statutes authorizing prevailing party attorney fees and the issue has been clearly resolved by this Court. *Fogerty v. Fantasy, Inc.*, 510 U.S. ___, 127 L.Ed. 2d 455 (1994) (holding that attorneys fees may be awarded to the prevailing party in copyright infringement case based upon the court's discretion); *Chicago & N.W.R. Co. v. NYE Schneider Fowler Co.*, 260 U.S. 35 (1922) (holding that a statute allowing a reasonable attorney's fee for failure to promptly settle a claim requiring

the plaintiff to litigate is not unconstitutional); *Iowa Life Insurance Co. v. Lewis*, 187 U.S. 337 (1902) (holding that a state statute allowing interest and attorneys fees was not in contravention to the Constitution of the United States). Prevailing party attorney fee statutes, as in this case, are equitable and in no way inhibit one's right to access to the courts. In fact, such statutes serve a compelling governmental interest in making the courts more accessible to a party which wants to recover a modest claim as is involved in the instant case.

III. CONCLUSION

The Oklahoma statute 12 O.S. Section 936 is narrowly drawn and satisfies a compelling governmental interest in making the courts more accessible to parties vindicating their rights. Consequently, the statute is not violative of Petitioner's right of due process under the Fourteenth Amendment to the Constitution of the United States. Therefore, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK

JOHN M. IMEL, OBA NO. 4542
320 South Boston Building,
Suite 920
Tulsa, Oklahoma 74103
(918) 582-5281

Attorney for Respondent,
Doc's Food Stores, Inc.

APPENDIX I.

NOT FOR PUBLICATION
IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION NO. I

DOC'S FOOD STORES, INC., Appellee,	)	
vs.	)	Case No. 84,368
BERNARD SCHWARTZ, Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE EDWARD J. HICKS, JUDGE

AFFIRMED

Bernard Schwartz,
Tulsa, Oklahoma, Pro Se,

James H. Ferris,
John W. Cannon,
Moyers, Martin, Santee, Imel & Tetrick,
Tulsa, Oklahoma, For Appellee.

MEMORANDUM OPINION

(Filed Feb. 13, 1996)

Opinion by Larry E. Joplin, Judge:

Appellant Bernard Schwartz seeks review of the trial court's order granting judgment to Appellee Doc's Food Stores, Inc. (Store) in Store's action against Schwartz to collect on a check issued by Schwartz to a third-party and

cashed by Store, but on which check Schwartz had ordered payment stopped. In this appeal, Schwartz challenges the constitutionality of an award of attorney fees to Store in this small claims action; the constitutionality of the appellate filing fee; the trial court's admission of allegedly incompetent/hearsay evidence; and the trial court's finding of Store as a good faith holder in due course. Having reviewed the record, we find no error as alleged and affirm the trial court's judgment.

Briefly stated, Schwartz hired the third party, Garrison, to care for Schwartz's ailing wife. Schwartz testified that after two and one-half days of employment, Garrison demanded payment of $400.00. According to Schwartz, he argued with Garrison over the amount but ultimately executed a check payable to Garrison for the amount requested. The next day, a Saturday, Garrison obtained a "stop payment" from his bank on the check to Garrison. On the same Saturday, Garrison presented the check to Store for payment, and Store without notice of the stop payment order cashed the check. When the payor bank refused to honor the check, Store brought the instant small claims action against Schwartz to recover the amount of the check.

After hearing, the trial court found that Store occupied the status of a good faith holder in due course of Schwartz's check, and on that basis granted judgment to Store for $400.00. The trial court further ordered Schwartz to pay attorney fees in the amount of $200.00 and court costs of $67.00. Schwartz moved for reconsideration which the trial court denied. Schwartz appealed and the matter stands submitted on narrative statement. Rule

1.22, Rules of Appellate Procedure, 12 O.S. 1991, Ch. 15, App. 3.

Schwartz first challenges the trial court's award of attorney fees. We agree with Schwartz that under the American Rule, the prevailing party is not entitled to attorney fees *unless provided for by contract or statute. See, e.g., Sisney v. Smalley,* 690 P.2d 1048 (Okla. 1984); *Okla. Publishing Co. v. Miskovsky,* 654 P.2d 596 (Okla. 1982). Under the Oklahoma Small Claims Procedure Act, 12 O.S. 1991 § 1751 et seq., any statute providing for an award of attorney fees applies in small claims actions so long as an attorney makes an appearance in the case. 12 O.S. § 1764. In that regard, Oklahoma statute permits an award of prevailing party attorney fees in an action to recover on a "negotiable instrument." 12 O.S. 1991 § 936. The definition of "negotiable instrument" includes a check. 12A O.S. 1991 § 3-104.

Schwartz asserts that 12A O.S. 1991 § 937 controls all actions to collect on a check, arguing that prevailing party attorney fees may only be granted in actions on checks returned for insufficient funds or no account. However, we believe a full reading of this statute reveals our legislature's intent to create only a special notice provision for those classes of returned checks, not a limitation on an award of prevailing party attorney fees restricted to actions on those classes of returned checks. Accordingly, we hold that in all other actions to recover on a negotiable instrument, including a check returned for reasons other than the two enumerated in 12 O.S. § 937, 12 O.S. § 936 authorizes prevailing party attorney fees to be taxed as costs. Because the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its

award of attorney fees. *See, e.g., Firemen's Ins. Co. of Newark, N.J. v. Renegar,* 856 P.2d 595 (Okla.App. 1993) (trial court's judgment regarding attorney fees will not be disturbed absent an abuse of discretion).

Schwartz next challenges the constitutionality of the appellate filing fee requirement from a judgment in a small claims action, arguing that the required filing fee posts an unconstitutional barrier to the appellate process. On this issue, we note that our legislature – although generally requiring a filing fee for appeal of civil cases – has specifically provided an alternate avenue for the filing of appeals by those unable to pay the requisite filing fee. 20 O.S. 1991 § 15. Schwartz made no claim for such relief in the present case and, in fact, paid the appellate filing fee, but a statute may not be attacked on constitutional grounds by one not injured thereby. *Dablemont v. State of Oklahoma, ex rel. Department of Public Safety,* 543 P.2d 563 (Okla. 1975). Schwartz having suffered no injury in the alleged particular, we consequently reject Schwartz's constitutional challenge.

Schwartz next asserts error by the trial court in allowing allegedly incompetent/hearsay as "the sole evidence" to support the trial court's determination that Store honored and negotiated the subject check in good faith, arguing that reliance on such hearsay testimony deprived him of his constitutional right to confront witnesses. Specifically, Schwartz complains of testimony by Store's owner that his employee knew Garrison personally and had previously cashed checks for Garrison, without testimony by the employee to that effect.

On this issue, we first note that the agreed narrative statement includes Store owner's testimony that he personally knew Garrison as a regular customer. Thus, we cannot say, without a record to the contrary, that the testimony targeted by Schwartz constituted the sole evidence in support of the trial court's findings. Second, the the small claims procedure seeks to render fair, impartial and speedy justice, with the hearing and disposition of each action "informal." 12 O.S. 1991 § 1761; *Black v. Littleton*, 532 P.2d 486 (Okla.App. 1975). Accordingly, the small claims court is not bound to adhere to the strict rules of evidence when such adherence interferes with the speedy and just determination of the issues. *Black*, 532 P.2d at 487. Moreover, the record bears out no objections by Schwartz at trial to the admission of the challenged testimony. We consequently find no abuse of discretion by the trial court in the admission of the questioned testimony as to require reversal.

Finally, Schwartz complains of the trial court's determination that Store stood as a good faith holder in due course of the check and, as such, entitled to recover thereon. Specifically, Schwartz asserts Store failed to exercise good faith or to observe reasonable commercial standards by honoring and negotiating the subject check without contacting either Schwartz or his bank in order to determine the validity of the check. 12 O.S. 1991 § 3-103(a)(4) (definition of "good faith"); 12A O.S. 1991 § 3-302(a)(2) (requirements of "holder in due course"). Alternatively, Schwartz argues that Store lost its status as holder in due course because the check was allegedly obtained by duress or illegality. 12A 3-305(a)(1) (defense of duress or illegality).

However, application of each of these provisions depend on proof of each of the respective elements. Thus, because application of these statutory provisions constitute questions of fact for the trier of fact, inasmuch as this matter stands submitted on narrative statement, we cannot say from review of the narrative statement that the trial court's express or implicit conclusions (1) that Store occupied the status of a good faith holder in due course of Schwartz's check, (2) that Store acted in a commercially reasonable manner, and/or (3) rejecting Schwartz's duress/illegality defenses lacks the requisite competent evidentiary support. *See, e.g., American Fertilizer Specialists, Inc. v. A.J. Wood, Jr.*, 635 P.2d 592, 593 (Okla. 1981); *Anglo-American Clothing Corp. v. Marjorie's of Tiburon*, 571 P.2d 427, 430 (Okla. 1977).

Finding competent evidentiary support for the trial court's judgment and the trial court's award of attorney fees unaffected by error of law or abuse of discretion, we consequently hold the orders of the trial court granting judgment and prevailing party attorney fees to Store should be and therefore are AFFIRMED.

JONES, P.J. AND GARRETT, J., CONCUR.